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John F. Sonnett Memorial Lecture Series: Legal Remedies Against the Council's Failure to Act

Ole Due

European Court of Justice

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4. Due's Lecture:

a. Due Biography

Ole Due was born on February 10, 1931. Due received his law degree from the University of Copenhagen in 1955, and in the same year, took up a post at Denmark's Ministry of Justice. In the years that followed, Ole Due worked in national service and was ultimately able to serve all of the European Community, as President of the Court of Justice. Like John Sonnett, Due devoted many of his early professional years to service of his country. At the Ministry of Justice, Due steadily worked his way to important positions of responsibility. In 1970, he became Head of Division and was made Director of the Ministry of Justice some five years later.

From 1964 to 1973, Due was Head of Course and Lecturer for post-graduate courses in Community Law at the Danish Legal Society, the Danish Civil Service Administration College, and the Council of Lawyers. From 1964 to 1976, he served as a member of the Danish delegation at the Hague Conference on Private International Law. Due served for many years as both Secretary and then President of the Commission on the Adaptation of Laws Prior to the Accession of Denmark to the European Communities. From 1970 to 1972, Due served as a Permanent Delegate to the conferences on the technical adjustments to be made to Community measures in view of the enlargement of the Communities and on drafting legal provisions in the Treaty of Accession.

Due was Editor of the Community Law Index from 1973 to 1975, and has published numerous articles on European Community Law, legal practice and private international law. He is co-editor and

author of the Danish Community Law Reports. He is an Honorary Bencher of both Gray's Inn, London and King's Inns, Dublin.

On October 7, 1979, Due became a judge at the Court of Justice of the European Communities. The Court of Justice has powers to oversee the interpretation and application of European Economic Community laws. On October 7, 1988, Due became President of the Court of Justice.

b. Due Introduction

Due Introduction

4th draft w/ JDF changes

The year 1992 marked the official beginning of the European Economic Community and a different era for Europe. After over three millennia of constant political conflict, Europe was to begin knocking down its borders -- at least economically. As an economic entity, a single Europe would pose a formidable presence in a new world order. The emergence of Japan as a world economic power has shown how a nation can gain political clout with a strong economy rather than with a devastating arsenal of weaponry.

With respect to the legal framework of the EEC, the judiciary branch is called the European Court of Justice. The Court of Justice interprets the articles of the Treaty of Rome and determines whether the economic harmonization legislation passed by the European Council, the EEC's legislative body, is followed by each member state. In order to harmonize the laws of so many different countries, the European Council issues directives that require each member state to comply with a specific area of law harmonization, be it banking, labor, or securities law. While the sovereignty and foreign policy of each EEC member state are not preempted by the EEC, any economic legislation such as quantitative measures and customs duties passed by a member state is subject to review and rescission by the Court of Justice.

In many ways, the Court of Justice is a distant cousin of the United States Supreme Court. While its American counterpart is guided by and interprets the concepts of the United States Constitution, the Court of Justice interprets the various articles of the Treaty of Rome which formalized the concept of a Europe

without economic borders. Since that document provides the foundation for the existence and the future of the new European economic entity, interpreting its articles incorporates similar responsibilities. The final decision of the Court of Justice will affect each and every member state. Unlike the United States, Europe's legal systems are not as homogeneous as those of the fifty American states. In this context, the Court of Justice may very easily overreach its discretion. The Honorable Ole Due, current President of the European Court of Justice, discussed these issues in his Sonnett Lecture.

Judicial activism by the high court is as much an issue in Europe as it is in the United States. Unlike the Supreme Court, the European Court of Justice is not grappling with such controversial social issues as abortion and privacy rights. Instead, the European Court of Justice tackles highly contested economic issues. The tension in the new Europe arises because the EEC consists of many nations with vastly different social, economic and cultural backgrounds. Because each directive issued by the European Council represents a compromise between these different nations, some nations will have to change their way of life somehow to achieve harmonization. Thus, there is a genuine concern for judicial activism which Ole Due addressed in his lecture at Fordham Law School.

c. **Lecture by Hon. Ole Due, "Legal Remedies Against
the Council's Failure to Act"**

ADDRESS

LEGAL REMEDIES FOR THE FAILURE OF EUROPEAN COMMUNITY INSTITUTIONS TO ACT IN CONFORMITY WITH EEC TREATY PROVISIONS*

Ole Due**

Any discussion of the case law of the Court of Justice of the European Communities (the "'Court'" or the "'Court of Justice'") will sooner or later touch upon what is commonly called the judicial activism of the Court.

A European Community Member State lawyer's attitude towards judicial activism normally depends on the relations between the judicial and legislative powers within his country. This relationship varies from Member State to Member State, ranging from the very cautious approach of the French and Danish courts to the extensive control exercised by the German court, the "'Bundesverfassungsgericht.'" As expected, the Court of Justice has placed itself somewhere in the middle of these extremes.

A U.S. lawyer will normally try to compare the case law of the Court of Justice with that of the U.S. Supreme Court, trying to distinguish between periods in which the tendency to promote integration has been more or less pronounced. Indeed, the Court of Justice's activism and role as intermediary between legislative and executive arms of the European Economic Community (the "'EEC'" or the "'Community'") and between national authorities and the institutions of the Community has led some to compare the Court to the U.S. Supreme Court under Chief Justice Marshall.

In fact, differences in the Court's jurisprudence may be observed over time. However, contrary to the situation in the United States, developments in the Court's jurisprudence are

difficult to relate to changes in its composition. While in the United States, it is perfectly acceptable for the executive branch to seek to influence future case law by making appointments to the federal courts, this is less common in the Member States of the EEC. I am not aware of any nomination to the Court of Justice aimed at changing the Court's attitude towards European integration.

Therefore, the different trends in the case law of the Court of Justice should probably be seen more as reactions to changes in the political environment. In periods where centrifugal tendencies have dominated the political scene, the Court has tried to defend treaty objectives against such tendencies. In certain periods, the political institutions, first and foremost the Council of Ministers of the European Communities (the "'Council'"), have found it hard to live up to the aims of the treaties, whether because of the need for unanimity in a decision of the Council or because of the political currents in some of the major Member States. During these periods, we may find a tendency to compensate for this lack of legislative activity by basing Court decisions directly on the treaty provisions. On the other hand, during periods of great political activity aimed at a strengthening of the Community, we may find the Court of Justice more reluctant to commit itself.

I shall concentrate on that part of the case law by which the Court has tried to compensate for the inaction of the political institutions. I shall examine this case law from a procedural viewpoint. My purpose is to find out which procedural weapons the Court has made use of.

That formulation might seem odd. Like other courts, the Court has no right to take initiatives itself. It must confine itself to dealing with the cases brought before it. It is thus up to the plaintiff to select the weapon that will best achieve the sought after objectives by way of the legal procedure used.

It is, however, clear that by means of its case law the Court has an important influence on that choice. By accepting a certain form of legal procedure as the appropriate form to achieve the plaintiff's objective, the Court can sharpen the weapon so that the procedure constitutes an attractive choice for future plaintiffs. Conversely, the Court can limit the effectiveness of a form of legal procedure so that recourse to that weapon will be made only when no other is available. It is this interplay between the plaintiff and the Court that I wish to examine.

My examination will be confined essentially to the legal remedies employed against the Council's inaction. However, since the Council consists of representatives of the Member States, I shall to some extent have to look also at the inaction of the Member States themselves.

I shall, moreover, confine myself to the EEC and its governing instrument, the Treaty Establishing the European Economic Community (the "'Treaty'" or the "'EEC Treaty'").¹ Euratom² has little practical significance in this respect. Further, even though the Treaty Establishing the European Coal and Steel Community³ raises certain interesting parallels, it chiefly concerns the relationship between undertakings and the Commission of the European Communities (the "'Commission'").

The EEC Treaty appears to indicate that the best weapon for confronting inaction should be the action for failure to act.⁴ Apparently, this type of action constitutes the proper means of forcing the institution in question to fulfil its duty to act. Experience shows, however, that quite different weapons have been effective.

I shall first run through the forms of procedure which have in practice proved to be the most appropriate before going on to examine why the action for failure to act has been of so little significance.

The most important innovation in the section of the EEC Treaty that deals with the Court is Article 177.⁵ This rule deals with the right, and in certain cases, the duty, of national courts to refer questions to the Court for a preliminary ruling on the interpretation and validity of Community rules. The aim of the provision is to ensure uniform interpretation and application of Community law in the Member States, but it has proven to offer other possibilities, especially [as a] in the area with which we are concerned. In fact, no other weapon against inaction on the part of the Member States and the organs of the Community[.] has been hardened and sharpened to such a degree by the Court's case law.

The process has involved several stages. First, the Court recognized that Community rules which impose clear and unconditional duties on the Member States create rights in favor of citizens and undertakings which they can rely on before national courts (direct effect).⁶ Subsequently, the Court mandated that

such Community rules oblige the authorities of the Member States to set aside any conflicting national provisions (precedence of Community law).⁷ Finally, the Court emphasized that a decision on the relevance of a preliminary ruling to a case pending before the national court is to be left to that national court. Such a decision cannot be challenged by the Member States or the EEC institutions in their observations before the Court of Justice.⁸

Thus hardened and sharpened, the preliminary ruling procedure became an effective weapon for the enforcement of the Treaty's standstill provisions.⁹ Subsequently, the procedure was useful in attaining the free movement of goods, persons, and services by the end of the transitional period on January 1, 1970, although some implementing provisions had still not been adopted by the Council.¹⁰ Finally, the preliminary ruling procedure gave effect to clear directive provisions that had not been correctly transposed into national law within the mandated time.¹¹

In a broad range of circumstances, the case law of the Court under Article 177 has led simply to the relinquishment, by the Commission, of legislative initiatives as superfluous after a decision by the Court. Such was the case with the implementing provisions in the spheres of establishment and services that had yet to be adopted at the end of the transitional period. It was also the direct conclusion drawn by the Commission after the so-called "'Cassis de Dijon'" line of cases,¹² developed by the Court on the basis of references for a preliminary ruling. The Commission concluded from that case law that as a principal and overriding rule, it was a breach of the prohibition in Article 30

of the Treaty to limit, for technical or commercial reasons, the marketing in its territory of goods that were lawfully produced and marketed in another Member State.¹³ That view led temporarily to an almost complete halt to the Commission's legislative initiatives with regard to the harmonization of the technical requirements of the Member States with respect to goods. The Commission was clearly convinced that traders would presumably know how to avail themselves of the means offered by the Court in order to remove such obstacles to trade.

Although the preliminary ruling procedure is an effective weapon against failure to act, its aim is not very accurate. It can be used to demolish barriers in the form of national provisions, but not to build up common rules, however desirable those rules might be. Fortunately, the Commission has now embarked on a more balanced harmonizing policy, and the Single European Act¹⁴ has created a legal basis that appears to provide an appropriate foundation for such a policy.

The Court's decisions in certain areas have thus rendered superfluous legislative initiatives already underway. However, the Court's decisions have also contributed to encouraging legislative initiatives in other areas. Moreover, national courts' application of Article 177 in cases between undertakings or private persons and national authorities continues to be an effective way of exerting influence over the implementation of Community rules by the Member States and of motivating the Council to adopt common rules. The cases on the application of the Treaty's competition rules to air transport are some of the most recent examples on this point.¹⁵

The Court held that the area of air transport is covered by the rules on competition. In addition, the Court attributed direct effect to the prohibition in Article 86¹⁶ of abuse of a dominant position in the Member States, despite the absence of implementation provisions. As a result of the Court's holding, common legislation in the area became an absolute necessity to avoid chaos. The Court was thus giving a decisive push in the direction of the long-awaited Community rules.

As a rule, however, the application of Article 177 is limited to cases where there are clear and unconditional duties of abstention or action. Admittedly, national courts are increasingly referring questions regarding the proper interpretation of a directive to the Court of Justice, on the assumption that the national legislature has intended to implement the directive correctly. Thus, the Article 177 procedure acquires a significance, independent of any direct effect the Community provision might have. However, this development has thus far been primarily limited to the national courts' application of national provisions that are designed to implement a specific directive. The private person's participation in bringing Community institutions' inactivity to an end thus remains, generally speaking, subject to the relevant Community provision being clear and unconditional.

Instead of referring to the private person's "participation" it would perhaps be more correct if I spoke of the private person's "initiative." In Article 177 cases, the Commission always avails itself of the right accorded to the institutions and Member States

to submit written observations, and the Commission always appears at the hearings. By means of its observations and pleadings, the Commission has made a decisive contribution to molding the preliminary ruling procedure into an appropriate weapon against the inactivity of the Council. A recent example of the Commission's activity involved a reference for a preliminary ruling intended to clarify whether the Netherlands' rules on value-added tax ("VAT") on trade in second-hand goods were compatible with Community law. Pursuant to article 32 of the Sixth VAT Directive,¹⁷ the Member States should have adopted common rules in that area by the end of 1977. In its written observations before the Court, the Commission argued that national rules which deviated from the VAT system's prohibition of principle against double taxation should now be regarded as a breach of Community law. The Commission argued that such a finding should be regarded as a consequence of more than ten years' inactivity in the VAT area. In that case the Court did not agree with the Commission.¹⁸ Notably, that case concerned a VAT on trade in second-hand goods within a single Member State and thus did not bear upon obstacles to trade between Member States. In an earlier decision,¹⁹ the Court had held that Article 95 of the EEC Treaty²⁰ obliged the Member States to deduct the residual part of the VAT²¹ when levying a VAT on the importation by a private person of second-hand goods. Thus, the Court went further than the Commission had suggested. The Court thereby brought about a legislative initiative on the Commission's part concerning the establishment of more detailed rules in respect of such deduction.

In addition to its contribution to Article 177 cases, the

Commission has another effective weapon at its disposal, namely an action against the Member States for infringement of the Treaty pursuant to Article 169.²² It is quite clear that ~~that~~ [this] form of procedure is a suitable means of putting an end to a Member State's inactivity. It is, however, surprising that it is also effective in reactivating a Commission proposal that has run aground in the Council. ~~There are a considerable number of examples on point. Two examples will suffice to demonstrate the technique.~~

The cases on the taxation of alcoholic beverages,²³ like the case on the light tax on Danish fruit wine,²⁴ formed part of an attempt on the part of the Commission to arouse the Member States' interest in adopting the Commission's proposals for the harmonization of tax on alcoholic beverages. By obtaining a ruling that the existing taxation system in a number of Member States was protectionist and therefore in breach of Article 95 of the Treaty, the Commission hoped to remove the main cause of the Member States' resistance to tax harmonization in the area of alcoholic beverages.

The attempt was successful inasmuch as in most cases the Court upheld the Commission's argument that the national tax system favored national beverages in a way that infringed Article 95. However, the Commission did not achieve its main objective. Even if some national systems are weighted in favor of their national products, they are primarily part of a general taxation policy pursuing fiscal and health ends which do not per se infringe Community law. The Commission therefore also had to include the area of alcoholic beverages in its general program for tax

harmonization in preparation for the completion of the internal EEC market in 1992.

An additional reason for the Commission's lack of success in the series of cases dealing with tax harmonization of alcoholic beverages was the Court's observance of the delineation of tasks between the legislature and the judiciary. In the case against the United Kingdom concerning the relationship between wine and beer taxation,²⁵ the Commission had hoped to force the Court to choose one of the criteria that the parties had suggested (tax calculation based on either volume, alcoholic strength, or pre-tax price). The Court, however, left the choice between those criteria to the legislature and confined itself to a finding that the wine was too heavily taxed regardless of the criterion applied.

On that particular point the Commission was more successful in the actions it brought against the Member States' restrictions on the rights of foreign insurance companies to contract for risk insurance without setting up branches or agencies. In the case against Germany,²⁶ the Commission managed to isolate the questions on which the Member States disagreed and which had thus blocked the adoption of the directive on services in the area. For its part, the Court succeeded in finding a solution to these questions by balancing the Treaty's general rules on free exchange of services against the special consumer protection considerations governing the insurance area. The directive could thus finally be adopted a year after the judgment was delivered.

An Article 169 action is especially effective against failure by the Council to act in areas where it is necessary to create new

rules but where the Community alone has competence. For example, as a consequence of lack of unanimity in the allocation of fishing quotas, the Member States sought, in the late 1970s, to protect the disappearing fishery resources by means of national rules. The Court, however, held that competence had irrevocably passed to the Community and the Member States could therefore act solely as negotiorum gestores²⁷ and then only with the Commission's consent.²⁸ On the other hand, the Court has not until now accepted the notion that in such a situation the Commission can, on grounds comparable to necessity, exercise the power conferred by the Treaty on a paralyzed Council.²⁹

A third form of procedure which has been used successfully by the Commission to prevent blocking in the Council is the action for annulment under Article 173 of the EEC Treaty.³⁰ In such cases the Council has in fact been active, but has, in the Commission's opinion, perhaps not gone far enough. For example, the Commission brought an action for annulment in a case where the Council had chosen to establish tariff quotas in the form of national quotas instead of Community quotas.³¹

That form of procedure has, however, been used by the Commission primarily as a weapon against the Council's tendency to base a legal measure on a provision of the Treaty that requires unanimity rather than on a provision that merely requires a qualified majority.³² In such cases, the Commission has generally not objected to the substance of the rules adopted. Rather, its challenge to the legal measure has been aimed solely at precluding any future blocking in the Council of the matter. The Court has

admitted this type of action.

As is well known, the Single European Act has made it possible for the Council to adopt more decisions by a qualified majority. It has, however, also conferred new powers on the Community, for example in environmental matters, where unanimity is required. There is consequently little chance that the Court will, in the near future, be able to avoid these cases, which often appear very formalistic but can have considerable impact on the balance of power between the institutions.

As a provisional conclusion it may thus be said that, according to the actual circumstances, references for preliminary rulings, actions for infringement of the Treaty, and even actions for annulment may constitute appropriate weapons against failure to act on the part of the Council.

Of the important forms of procedure under the Treaty, only the action for failure to act and the action for damages have not been mentioned. Both have been tried, but have met with little success.

It is clear from the text of the EEC Treaty that an action for failure to act brought by an undertaking or a private person against the Council is unlikely to be admissible. Under the third paragraph of Article 175, natural or legal persons may only complain in the case of a failure to address an act "to that person."³³ Apart from its relationship to its servants, the Council does not issue acts addressed to individual persons or undertakings. The expression "to that person" has been extended, by analogy with Article 173 on actions for annulment, to encompass acts that are not addressed to the applicant but concern him

directly and individually.³⁴ Even then, it is difficult to imagine any action for failure to act brought by an undertaking or a private person against the Council that would not be dismissed, because the case law of the Court on Article 173 is so strict.

Here the action for damages provided for in Article 178³⁵ offers, in principle, better prospects. The Court has held that even if an action for damages can lead to a result similar to that of an action for failure to act, this may not per se lead to its being dismissed.³⁶ Moreover, the award of compensation for a failure to act will certainly, as a general rule, presume infringement of a duty to act. The infringement will be, in turn, indirectly established thereby. But if the Court is not exacting in regard to formal requirements for an action for damages, it has, however, mandated strict substantive conditions which must be fulfilled before it will recognize liability for damages in connection with the Community's law-making activity. In practice, the Court therefore will be able to find in favor of the Community without expressly adopting a position on the question whether there was a formal duty to act.

Any undertaking or private person seeking the Court's assistance against the Council's failure to act is thus in fact obliged to use a roundabout approach. The undertaking or private person must persuade a national court to refer a question to the Court for a preliminary ruling under Article 177.

There is no such limitation on the right of so-called "privileged applicants," the Member States and the other Community institutions, to bring an action for failure to act.

While there are odd examples of actions for failure to act brought by a Member State against the Commission,³⁷ thus far no Member State has itself brought an action for failure to act against the Council. That might, of course, be explained by the general disinclination of the Member States to seek the Court's assistance in resolving disputes between them. That disinclination cannot, however, explain why the Commission has brought only one action for failure to act against the Council.³⁸

The restraint of the privileged applicants may therefore be a result of the weak effect of a judgment establishing failure to act. Whereas a declaration of nullity brings to an end the existence of a legal measure challenged, usually even with retrospective effect, the failure to act remains as such after a judgment pursuant to Article 175. The Court cannot itself promulgate the desired legal measure. Under Article 176,³⁹ the duty to comply with the judgment supplements the pre-existing duty to act found in the judgment. However, it is still up to the political authorities to adopt the legal measure in accordance with the general rules of legislative procedure. A direction to the legislature regarding the detailed content of the legal measure may only be ordered if the unfulfilled duty to act is described precisely in the EEC Treaty. Due to the Treaty's character as a framework instrument, the Treaty will seldom provide such a clear description.

In a case concerning the absence of a transport policy,⁴⁰ in which the Commission intervened in favor of the applicant European Parliament (the "'Parliament'"), the Court even held that it could

find a failure to act only if the Treaty indicated at least the aim of the required measure. In the transport policy area, this condition was fulfilled only with regard to the liberalization of services. And even in this respect, it must be admitted that the judgment has not, in practice, provided the Community legislation with the desired momentum.

In reality, the Commission and the Member States have an evident interest in an action for failure to act only if the duty to act is set out in a clear and unconditional manner in the Treaty. Only in such instances can the Court declare obiter that the Treaty provision has direct effect regardless of the Council's failure to act. The Netherlands government sought such a holding by the Court with regard to liberalization of services when it intervened in the transport policy case. On that point the Court wisely exercised restraint. It did not regard the requirement of freedom to provide services in the area of transport as having become directly effective once the transitional period had expired. The Council was entitled to a reasonable period to work out rules on the matter as part of the Community's transport policy and it was not necessary to adopt a position with regard to the consequences of possible continued failure to act on the part of the Council. Nevertheless, that circumspect hint in the judgment might very well give rise to a fresh action for failure to act if the plans for a gradual liberalization of cross-border road transport are not implemented in 1992.

Apart from the possibility of such obiter dicta, an action for failure to act does not give the Member States or the Commission a

weapon against the Council's failure to act which is more effective than their political means as participants in the legislative process or their legal arsenal described above. As far as the Commission is concerned there is, however, an exception to this rule, namely the budget procedure. Budgetary authority is shared between the Council and the Parliament. The Commission is more or less detached from the procedure once it has transmitted its preliminary draft budget to the Council. From then on it may exert its influence only indirectly and its best ally is then the Parliament. The Commission thus has an interest in whether the Council timely adopts its budget proposals and forwards those proposals to the Parliament. Even though a budget is necessary for the Community's continued work, there is no possibility that failure to act might create a ground of necessity for the Commission. The consequence of absence of a budget is in fact expressly spelled out in Article 204 of the Treaty, the so-called "one-twelfth rule."⁴¹ Also, an action for annulment is an inappropriate means of dealing with a budget that has been adopted too late.

Therefore, in the absence of better weapons, t[T]he Commission might have an interest in challenging the Council's failure to act in its capacity as budgetary authority by way of an action under Article 175. It has in fact done so once, in 1987, when the Council did not transmit the budget proposals to the Parliament in time.⁴² The action brought by the Commission and the corresponding action brought by the Parliament⁴³ were regarded by the Court as being devoid of purpose once the Council, albeit after a long

delay, had fulfilled its duty to act; the actions had nonetheless fulfilled their function as a means of exerting pressure.

The Community institution that has the greatest interest in the possibilities of bringing an action for failure to act is the Parliament. Even though its political powers have been considerably extended in relation to the original treaties, first as regards the budget and most recently in the Single European Act in legislative matters, it has still not been granted the power to initiate action in these areas. The Parliament may thus avail itself of its budgetary and legislative powers only if the requisite proposal is submitted to it.

It was therefore natural for the Parliament to bring an action in the already mentioned case against the Council concerning the absence of a transport policy and for it to bring proceedings with the Commission in 1987, when the Council had not timely transmitted the draft budget for the coming year.

The Parliament has an even greater interest in the right to bring an action for annulment against an act of the Council when the Council has not sufficiently considered the Parliament's wishes. Although the Parliament now has the last word in the budget negotiations, the Council makes the final decisions in the legislative area. Even where the Treaty provides for the use of the cooperation procedure that was introduced by the Single European Act, the most the Parliament can do is to force the Council to comply with the requirement of unanimity if the Council disagrees with the position of the Parliament. Over the last year the Parliament has therefore fought to win the right to bring an

action for annulment. It failed at its first attempt, but now in the last round it has won a partial victory.

The difficulty is that the Parliament is not among the institutions mentioned in the first paragraph of Article 173, conferring the right to bring an action for annulment. During the negotiations for the Single European Act, the question whether the Parliament should be incorporated into the text was raised, but no solution was reached. This rested in part on the ground that the Parliament had already raised the question before the Court in the so-called "'Comitology'" case."

True, the second paragraph of Article 173, referring to "'any natural or legal person'" gives a limited right to bring an action. However, it does not seem natural initially to exclude the Parliament from the rule concerning the institutions in the first paragraph and then to let that institution in through the back door as a "'legal person,'" an expression which hardly covers the Parliament. Moreover, the requirement in the second paragraph that the applicant must be directly and individually concerned by the legal measure is not an adequate representation of the Parliament's interest in bringing an action.

It is therefore not so surprising that the Court in the "'Comitology'" judgment did not think it could interpret Article 173 as giving the Parliament the right to bring an action for annulment.

If the "'Comitology'" judgment has met with strong criticism, that is primarily because the judgment simultaneously sought to show that the Parliament was not without any legal safeguard

against the disregard of its prerogatives on the part of the Council. The judgment states in particular that as guardian of the Treaty, the Commission has the responsibility for ensuring that the Parliament's prerogatives are respected and for bringing such actions for annulment as might prove necessary. The judgment also indicated that the Parliament itself has a right to bring an action for failure to act under Article 175, which refers to all the institutions of the Community.

In this respect, the judgment states that the right to bring an action for failure to act is not extinguished merely because the institution that is requested to act refuses the request, unless that refusal can be regarded as putting an end to the failure to act. That statement is not completely in accordance with earlier case law.⁴⁵ Previously, the Court was inclined to regard such a refusal as a definition of position that excluded an action for failure to act. However, the refusal could be challenged as a corollary issue by way of an action for annulment. The statement can therefore be construed as an indication that the Court would have been more sympathetic to an action for failure to act brought by the Parliament, because this institution was barred from bringing an action for annulment. Thus the judgment may be understood as indirectly encouraging the Parliament to explore the avenue of an action for failure to act.

The Parliament did not pursue an action for failure to act, but instead persisted in the fresh action for annulment which had already been brought before the "'Comitology'" judgment. The Parliament's course was surely due primarily to the remarks in the

judgment concerning the Parliament's other legal safeguards. In the "'Comitology'" case, the other legal safeguards were actually obiter dicta, but they were highly relevant to the new case because in the Parliament's view the circumstances clearly showed that the other safeguards were inadequate.

In the "'Comitology'" case the Parliament had principally challenged the content of the Council's measure which differed substantially both from the original Commission proposal and from the Parliament's suggested amendments. The new case was directed against a Council regulation mandating maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident. The Parliament challenged the fact that the Council, in accordance with the Commission's proposal, had based its legal measure on a provision in the Euratom Treaty which requires merely that the Parliament be consulted.⁴⁶ The Parliament argued that the measure should have been based on a provision in the EEC Treaty which requires that the more extensive cooperation procedure be applied.

It was clear that the Commission, which agreed with the Council on the basis chosen, could not appear as the Parliament's champion. Moreover, there was very little sense in bringing an action for failure to act against the Council, because the Council had already adopted the final act.

In addition, there was the fact that the Court, in cases brought by private plaintiffs, had previously stated that a tacit refusal to revoke a legal measure may not be challenged pursuant to Article 175. Such a challenge would constitute a circumvention of

the restrictions in Article 173.⁴⁷ The Court had also held that Article 175 is aimed at failure to make a decision, and is not directed at the adoption of an act other than that desired by the applicant.⁴⁸

In its recent judgment,⁴⁹ the Court recognized that the "'Comitology'" judgment was too uncompromising in its rejection of the Parliament's right of action. The Court maintained its view that the Parliament is covered by neither the first nor second paragraph of Article 173. However, the Court inferred a limited right of action pursuant to the Court's duty to ensure observance of the institutional balance provided for by the Treaty. This principle, however, is limited to cases where the action is intended to safeguard the Parliament's special prerogatives. Moreover, the action must be based on grounds which relate to the alleged disregard of those special prerogatives. Because the case before it did in fact lie within those bounds, the Court admitted the case for a decision on its merits.

[This] The most recent judgment on this issue, discussed immediately above, does not exclude the Parliament's right to bring an action for failure to act in an appropriate situation as soon as the Parliament notices that the Commission is basing its proposal on a provision that does not give the Parliament the desired influence. However, it is clear that the judgment does diminish the Parliament's interest in such a course of action. As stated, an action for annulment is an extremely strong weapon and in an initial phase, the Parliament will presumably prefer to exercise its political influence, now reinforced by some appropriate legal

"sabre-rattling."

In sum, it may be stated that the Court's case law has developed a range of very effective weapons to be used against the Council's failure to act. This has resulted in various forms of procedure which, from a superficial reading of the Treaty, might appear completely unsuited for the purpose. On the other hand, the ostensibly appropriate weapon, the action for failure to act, has proved to be so innocuous that it has been largely abandoned in favor of those procedures developed later. For a short time, it appeared that the action for failure to act might be resuscitated as the Parliament's only legal remedy to safeguard its prerogatives in the legislative procedure. However, after the most recent judgment on this issue, the action for failure to act has also lost its real significance as a legal remedy for the Parliament. Henceforth the action for failure to act may be primarily regarded only as a measure of last resort.

*.A version of this Article was delivered as the Nineteenth Annual John F. Sonnett Memorial Lecture at the Fordham University School of Law on November 1, 1990.

**..President, 1988-present, Judge, 1979-1988, Court of Justice of the European Communities; Member, Danish Delegation to the Hague Conference on Private International Law, 1964-1976.

1.Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

2.Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 295 U.N.T.S. 259 [hereinafter Euratom Treaty].

3.Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 140.

4.EEC Treaty, supra note 1, art. 175.

5. Id. art. 177.

6. The first clear decision in that respect is the judgment of Van Gend & Loos, Case 26/62, 1963 E.C.R. 1, Common Mkt. Rep. (CCH) g 8008.

7. The precedence of Community law was first established in the judgment of Costa v. ENEL, Case 6/64, 1964 E.C.R. 585, Common Mkt. Rep. (CCH) g 8023. The principle found its clearest expression in the judgment of Simmenthal, Case 106/77, 1978 E.C.R. 629, Common Mkt. Rep. (CCH) g 8476.

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8. See Salgoil, Case 13/68, 1968 E.C.R. 453, Common Mkt. Rep. (CCH) g 8072.

9. Van Gend & Loos, Case 26/62, 1963 E.C.R. 1, Common Mkt. Rep. (CCH) g 8008.

10. See Reyners, Case 2/74, 1974 E.C.R. 631, Common Mkt. Rep. (CCH) g 8256; Van Binsbergen, Case 33/74, 1974 E.C.R. 1299, Common Mkt. Rep. (CCH) g 8282; Charmasson, Case 48/74, 1974 E.C.R. 1383, Common Mkt. Rep. (CCH) g 8291. The transitional period was the period within which the Common Market should be established. See EEC Treaty, supra note 1, art. 8.

11. Becker, Case 8/81, 1982 E.C.R. 53, Common Mkt. Rep. (CCH) g 8789.

12. See Rewe-Zentral, Case 120/78, 1979 E.C.R. 649, Common Mkt. Rep. (CCH) g 8543.

13. EEC Treaty, supra note 1, art. 30 (regarding measures having effect equivalent to quantitative restrictions between Member States).

14. O.J. L 169/1 (1987), Common Mkt. Rep. (CCH) g 21,000.

15. See Asjes, Joined Cases 209 to 213/84, 1986 E.C.R. 1425, Common Mkt. Rep. (CCH) g 14,287 (known as the Nouvelles Frontières case); Ahmed Saeed, Case 66/86, 1989 E.C.R. 803, Common Mkt. Rep. (CCH) [1989] 2 CEC 654.

16. EEC Treaty, supra note 1, art. 86.

17. Council Directive No. 77/388, O.J. L 145/1 (1977), Common Mkt. Rep. (CCH) g 9947.

18. See ORO Amsterdam Beheer, Case 165/89, 1989 E.C.R. 4081.

19. See Schul, Case 15/81, 1982 E.C.R. 1409, Common Mkt. Rep. (CCH) g 8831.

20. EEC Treaty, supra note 1, art. 95.

21. The residual part of the VAT is reflected in the value of the goods at the time of initial purchase in the exporting Member State.

22. EEC Treaty, supra note 1, art. 169.

23. See Commission v. France, Italy and Denmark, Cases 168, 169 & 171/78, 1980 E.C.R. 347, 385 & 447, Common Mkt. Rep. (CCH) gg 8647, 8648 & 8649.

24. See Commission v. Denmark, Case 106/84, 1986 E.C.R. 833, Common Mkt. Rep. (CCH) g 14,315.

25. See Commission v. United Kingdom, Case 170/78, 1980 E.C.R. 417, Common Mkt. Rep. (CCH) g 8651, case reopened, 1983 E.C.R. 2265.

26. See Commission v. Germany, Case 205/84, 1986 E.C.R. 3755, Common Mkt. Rep. (CCH) g 14,339.

27. Black's Law Dictionary defines a negotiorum gestor as, inter alia, "one who, without any mandate or authority, assumes to take charge of an affair or concern for another person, in the latter's absence, but for his interest." Black's Law Dictionary 1036 (6th ed. 1990).

28. See Commission v. United Kingdom, Case 804/79, 1981 E.C.R. 1045, Common Mkt. Rep. (CCH) g 8752.

29. See Kingdom of the Netherlands v. Commission, Case 326/85, 1987 E.C.R. 5091; see also Pluimveeslachterij, Joined Cases 47 & 48/83, 1984 E.C.R. 1721, Common Mkt. Rep. (CCH) g 14,087 (offering possible suggestion that Commission is entitled to act on ground of necessity).

30. EEC Treaty, supra note 1, art. 173.

31. See Commission v. Council, Case 51/87, 1988 E.C.R. 5459.

32. See, e.g., Commission v. Council, Case 45/86, 1987 E.C.R. 1493; cf. United Kingdom v. Council, Case 68/86, 1988 E.C.R. 855, Common Mkt. Rep. (CCH) g 14,475 (known as the Hormones judgment and brought by Member State); United Kingdom v. Council, Case 131/86, 1988 E.C.R. 905, Common Mkt. Rep. (CCH) g 14,494 (known as the Battery Hens judgment and brought by Member State).

33. EEC Treaty, supra note 1, art. 175.

34. See, e.g., Holtz and Willemsen v. Council, Case 134/73, 1974 E.C.R. 1, Common Mkt. Rep. (CCH) g 8255 (known as the Holtz and Willemsen I judgment).

35. EEC Treaty, supra note 1, art. 178.

36. See, e.g., Holtz and Willemsen v. Council, Case 153/73, 1974 E.C.R. 675, Common Mkt. Rep. (CCH) g 8277 (known as the Holtz and Willemsen II judgment).

37. See, e.g., Germany v. Commission, Case 84/82, 1984 E.C.R. 1451, Common Mkt. Rep. (CCH) g 14,090; Germany v. Commission, Case 44/81, 1982 E.C.R. 1855, Common Mkt. Rep. (CCH) g 8,839 (attempting to invent non-existent action for payment); Asteris and Others and Hellenic Republic v. Commission, Joined Cases 97, 99, 193 & 215/86, 1988 E.C.R. 2181, Common Mkt. Rep. (CCH) g 14,502 (holding that action for failure to act was changed to action for annulment of earlier express decision that refused to issue desired measure).

38. See Commission v. Council, Case 383/87, 1988 E.C.R. 4051.

39. EEC Treaty, supra note 1, art. 176.

40. See Parliament v. Council, Case 13/83, 1985 E.C.R. 1513, Common Mkt. Rep. (CCH) g 14,191.

41. EEC Treaty, supra note 1, art. 204. Article 204 provides in part:

If at the beginning of a financial year, the budget has not yet been voted, a sum equivalent to not more than one-twelfth of the budget appropriations for the preceding financial year may be spent each month

Id.

42. See Commission v. Council, Case 383/87, 1988 E.C.R. 4051.

43. See Parliament v. Council, Case 377/87, 1988 E.C.R. 4017.

44. Parliament v. Council, Case 302/87, 1988 E.C.R. 5615, Common Mkt. Rep. (CCH) [1990] 2 CEC 139.

45. See, e.g., Nordgetreide v. Commission, Case 42/71, 1972 E.C.R. 105, Common Mkt. Rep. (CCH) g 8,174.

46. Euratom Treaty, supra note 2, art. 31.

47. See Eridania v. Commission, Joined Cases 10 & 18/68, 1969 E.C.R. 459, Common Mkt. Rep. g 8,099.

48. See Deutscher Komponistenverband v. Commission, Case 8/71, 1971 E.C.R. 705, Common Mkt. Rep. (CCH) g 8,143; Irish Cement v. Commission, Joined Cases 166-220/86, 1988 E.C.R. 6973.

49. See Parliament v. Council, Case 70/88 (Judgment of May 22, 1990), 1990 E.C.R. I (known as the "'Post Tchernobyl-judgment'').